



CDDH-MIG(2019)12
07/10/2019

STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

**DRAFTING GROUP ON MIGRATION AND HUMAN RIGHTS
(CDDH-MIG)**

Existing work on family-based care and ways forward

Draft Background Paper

Existing work on family-based care and ways forward

Draft Background Paper

CONTENTS

I.	PURPOSE OF DOCUMENT	3
II.	INSTITUTIONAL CONTEXT AND BACKGROUND	3
III.	FAMILY-BASED CARE	4
	1. Definitions	4
	2. Legal and policy context	5
	<i>2.1 United Nations</i>	<i>5</i>
	<i>2.2 European Union</i>	<i>7</i>
	<i>2.3 Council of Europe</i>	<i>9</i>
	3. Issues in the practical application of family-based care	10
	4. Reports and initiatives of other stakeholders	12
IV.	POTENTIAL CONTRIBUTION BY THE COUNCIL OF EUROPE	16

I. PURPOSE OF DOCUMENT

1. At its upcoming meeting, 23 - 24 October 2019, the CDDH-MIG is expected to decide on the key themes and type of product to be pursued and concluded in 2020 on the topic of family-based care for unaccompanied and separated minors. In order to facilitate consideration and discussion within the Group, this document provides the background to this choice of topic and outlines some of the existing work already done (and/or under consideration) in the field by other actors. It also reflects on the type of product the CDDH-MIG may want to contemplate.

II. INSTITUTIONAL CONTEXT AND BACKGROUND

2. The CDDH Analysis *Legal and practical aspects of effective alternatives to detention in the context of migration* (hereafter “the CDDH Analysis”), sets out a comprehensive collation of international standards in relation to alternatives to immigration detention. It makes an important contribution, *inter alia*, to underscoring member States’ existing obligations to consider alternatives to detention, particularly for individuals in a vulnerable situation, such as children.
3. The obligation to consider alternatives to detention can be rendered nugatory if such measures do not exist in practice. To this end, it has been noted that a significant step towards progress could be the exchange of “practical know-how and concrete methods in the field that up to now have proven their value”.¹ In terms of work beyond the CDDH Analysis, it has likewise been highlighted that member States “could benefit from stronger support in their endeavours as regards addressing persisting challenges in implementing alternatives effectively.”²
4. As for the situation of children specifically, the CDDH Analysis identifies a number of general protection gaps for unaccompanied and separated minors, including “ineffective guardianship mechanisms, age assessment procedures, mechanisms to ensure the child’s best interests, and limited or non-existing places in specialised facilities for children.”³
5. In the Council of Europe [Action Plan](#) on *Protecting Refugee and Migrant Children in Europe* (hereafter “the Action Plan”), adopted by the Council of Europe Committee of Ministers in May 2017, three pillars were identified with a particular focus on unaccompanied and separated children:
 - (a) Ensuring access to rights and child-friendly procedures;
 - (b) Providing effective protection; and
 - (c) Enhancing the integration of children who would remain in Europe.⁴
6. The Action Plan specified that the Council of Europe would adopt a cooperative approach with the European Union, the United Nations and their agencies, relevant

¹ CDDH Analysis, op. cit., p.130.

² Ibid., p.10; see further p.13.

³ Ibid., p.123.

⁴ Council of Europe (2017), Council of Europe Action Plan on Protecting Refugee and Migrant Children in Europe (2017-2019), Committee of Ministers, 127th Session of the Committee of Ministers, Nicosia, 19 May, (“Action Plan”), p.6.

NGOs and other key stakeholders to “ensure complementarity and [to] bring about collective initiatives whenever necessary”.⁵

7. The objectives of the Action Plan were to focus on “issues that have not yet received sufficient attention by the Organisation’s strategic partners” and “issues in respect of which solutions are needed over which all Council of Europe member States can claim ownership”.⁶ *Inter alia*, the Action Plan foresaw a draft Recommendation “to be submitted to the Committee of Ministers on appropriate standards for the reception and accommodation of refugee and migrant children (in open structures, i.e. in a non-custodial environment)”.⁷
8. The particular issue of reception standards was first broached at the fifth meeting of the CDDH-MIG held on 23 - 25 October 2018. There, the Special Representative of the Secretary General on Migration and Refugees (“SRSG”) encouraged the CDDH-MIG to address the reception conditions of children. He noted, in particular, that the work would not need to be concluded in 2019 but could extend into the following biennium. He likewise highlighted that the scope and format of the work could be at the discretion of the CDDH.⁸
9. At its 91st meeting, 18 - 21 June 2019, the CDDH endorsed the work concluded by CDDH-MIG in the field of alternatives to immigration detention. It further concluded that the CDDH-MIG should continue operating in the next biennium and focus, in the first instance, on family-based care for unaccompanied and separated children. “If time and resources allow, potential guidelines on alternatives to immigration detention might simultaneously be explored.”⁹ In order to ensure sufficient scope for future work, the CDDH proposed that the mandate for 2020-2021 should state that, “on the basis of the work carried out in 2018-2019, a draft of one or more non-binding instruments of the Committee of Ministers (for example recommendation, guidelines, manual of good practice etc.) will be prepared concerning human rights issues in the context of migration.”¹⁰
10. At the present time, the CDDH-MIG is allotted two meetings in 2020 to conclude its work on family-based care.

III. FAMILY-BASED CARE

1. Definitions

11. Reception modalities for migrant and refugee children have been commonly identified as accommodation with parents or guardians, placement with adult relatives, foster care or in specialised facilities for children.
12. Consistent with international standards, family-based care can take the form of:

⁵ Ibid.

⁶ Ibid.

⁷ Ibid., p.13.

⁸ Council of Europe (2018), Steering Committee for Human Rights (CDDH), Drafting Group on Migration and Human Rights (CDDH-MIG), *Report*, CDDH-MIG(2018)R5, 7 November, para 7.

⁹ Council of Europe (2019), Steering Committee for Human Rights (CDDH), *Report*, CDDH(2019)R91, para 43, 44.

¹⁰ Council of Europe (2019), Steering Committee for Human Rights (CDDH), *Report*, CDDH(2019)R91, para 43, 44.

- (a) Informal care – a private arrangement for the care of a child ordered outside an administrative, judicial or other duly accredited body; or
- (b) Formal care – care provided by a family for a child ordered by a competent administrative body or judicial authority.¹¹

13. Care may be provided to a child in the following contexts:

- (a) Kinship care – care for the child within its extended family or with close friends of the family that are known to the child;
- (b) Foster care – a competent authority has placed the child in care by a family other than the child's own family, but which has been selected, qualified, approved and supervised to provide such care;
- (c) Other family-based or family-like care placements; and
- (d) Residential care – care for the child within a non-family-based group setting.¹²

14. For the purpose of this document, the term “family-based care” will be used to include the circumstances described in (a) - (c), unless otherwise specified.

2. Legal and policy context

2.1 United Nations

15. At the international level, the UN Convention on the Rights of the Child provides that any child temporarily deprived of his or her family environment is entitled to special protection and care provided by the State, including placement in alternative care.¹³ Due regard is to be paid to the desirability of continuity in a child's upbringing and to the ethnic, religious, cultural and linguistic background of the child.¹⁴ These protections apply to all children regardless of their migration status.¹⁵ The UN Guidelines on the Alternative Care of Children favour the placement of a child in a family setting over institutional care and, in the context of children already abroad, unaccompanied and separated children should enjoy the same level of protection as national children.¹⁶ The 2017 Joint General Comment No. 4 calls for unaccompanied and separated children to be “placed in the national/local alternative care system, preferably in family-

¹¹ United Nations General Assembly (2010), *Guidelines on the Alternative Care of Children*, Resolution 64/142, 24 February, (“UNGACC”) para 29(b).

¹² Ibid., para 29(c).

¹³ United Nations (1989), Convention on the Rights of the Child, General Assembly Resolution 44/25 (“CRC”) Article 20; United Nations (2005), Committee on the Rights of the Child, *General Comment No. 6 (2005): Treatment of Unaccompanied and separated Children Outside their Country of Origin*, CRC/GC/2005/6, 17 May – 3 June (“CRC Committee General Comment 6”), para 40.

¹⁴ CRC, Article 20(3); CRC Committee General Comment 6, Para 40; UNGACC, para 142.

¹⁵ CRC, Articles 2 and 22(2); CRC Committee General Comment 6, paras 12-18; see also United Nations (2016), Committee on the Rights of the Child, *General Comment No. 20 (2016) on the implementation of the rights of the child during adolescence*, CRC/C/GC/20, 6 December, para 77; and UNGACC, para 142

¹⁶ UNGACC, paras 22 and 140; See further, United Nations (2017), *Joint General Comment No.4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No.23 (2017) of the Committee on the Rights of the Child on the General Principles regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return*, CMW/C/GC/4, 16 November, (“Joint General Comment No. 4”), paras 13 and 27.

type care with their own family when available, otherwise in community care when family is not available”.¹⁷

16. The Global Compact for Migration uses as its guiding principles *inter alia*:

- (a) a child-sensitive approach with the best interests of the child as a primary consideration, including unaccompanied and separated children;
- (b) a whole-of-government approach “to ensure horizontal and vertical policy coherence across as sectors and levels of government”; and
- (c) a whole-of-society approach through “broad multi-stakeholder partnerships to address migration in all its dimensions”.¹⁸

17. In the context of the detention of children, the Global Compact for Migration evidences a commitment to “prioritize non-custodial alternatives to detention”¹⁹ by:

- (a) “expand[ing] alternatives to detention, favouring non-custodial measures and community-based care arrangements, especially in the case of families and children”;²⁰
- (b) “consolidat[ing] a comprehensive repository to disseminate best practices of human rights-based alternatives to detention in the context of international migration, including by facilitating regular exchanges and the development of initiatives based on successful practices among States and between States and relevant stakeholders”;²¹ and
- (c) ensuring the “availability and access of a viable range of alternatives to detention in non-custodial contexts, favouring community-based care arrangements, that [...] respect their right to family life and family unity, and by working to end the practice of child detention in the context of international migration”.²²

18. Although a less exhaustive statement than the Global Compact for Migration, the Global Compact on Refugees supports the “development of non-custodial and community-based alternatives to detention, particularly for children”.²³

19. Among the international agencies, the UNHCR Guidelines on the Care and Protection of Children call for national or local child welfare services to supervise the care and placement of unaccompanied and separated children and receive care “that meets at least the minimum standards provided for national children”.²⁴ The Guidelines indicate that the form of placement is to be determined on a case-by-case basis for each child as either family or group contexts may suit different children. Efforts should be made to ensure placement in a similar family or group to the child’s ethnic, cultural, linguistic

¹⁷ Joint General Comment No.4, op. cit., para 13; see further United Nations (2012), Committee on the Rights of the Child, *Committee on the Rights of the Child, Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration*, 28 September, para 79.

¹⁸ United Nations (2017), *Global Compact for Safe Orderly and Regular Migration*, 13 July (“Global Compact for Migration”), para 15.

¹⁹ Ibid., Objective 13, para 29.

²⁰ Ibid., para 29(a).

²¹ Ibid., para 29(b).

²² Ibid., para 29(h).

²³ United Nations (2018), UNHCR, *Report of the United Nations High Commissioner for Refugees: Part II Global Compact on Refugees*, A/73/12 (Part II), (“Global Compact on Refugees”), para 60.

²⁴ United Nations (1994), UNHCR, *Refugee Children – Guidelines on Protection and Care* (2001 reprint), p.92.

and religious background.²⁵ This position was reinforced in the UNHCR's Detention Guidelines, emphasising the primary objective of the best interests of the child.²⁶

20. The UNHCR's Framework for the Protection of Children adopts a family and community-based approach as one of its principles²⁷ with a suggestion to map the national legal framework in relation to child protection in the context of unaccompanied and separated children and foster care.²⁸ The UNHCR's Beyond Detention strategy also contemplates alternative reception and care arrangements, citing foster care as an example.²⁹ UNHCR and UNICEF have jointly called for the immediate referral of unaccompanied and separated children to child protection services.³⁰ UNICEF also advances family-based foster care as an alternative to detention.³¹ The Summary of Discussions of the UNHCR Roundtable on Reception and Care Arrangements for Asylum-Seeking Children noted that "alternative care arrangements and community placement should be considered and facilitated as alternatives to detention" and that "for unaccompanied and separated minors or separated children, foster family placement can be very beneficial – but requires careful selection, preparation and continuous support".³²

2.2 European Union

21. In the European Union, the protection of the rights of the child are expressly referred to in the Treaty on the European Union.³³ A child's right to protection and care is guaranteed under the EU Charter³⁴ when, *inter alia*, Member States are implementing EU Law.³⁵
22. European Union secondary legislation on asylum has, since 2003, provided for the placement of unaccompanied and separated children with adult relatives, with a foster family, in accommodation centres with special provisions for children, or in other accommodation suitable for children.³⁶ That placement is to occur from the moment a child is admitted to the territory to the moment the child is obliged to leave,³⁷ and when international protection is granted.³⁸ The best interests of the child is a primary

²⁵ Ibid.

²⁶ United Nations (2012), UNHCR, *Detention Guidelines – Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, ("UNHCR Detention Guidelines"), para 54.

²⁷ United Nations (2012), UNHCR, *A Framework for the Protection of Children*, ("UNHCR Framework for the Protection of Children"), p.15.

²⁸ Ibid., p.27.

²⁹ United Nations (2014), UNHCR, *Beyond Detention: A Global Strategy to support governments to end the detention of asylum-seekers and refugees – 2014-2019*, p.17.

³⁰ United Nations (2014), UNHCR & UNICEF, *Safe & Sound – What States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, p.33.

³¹ United Nations (2017), UNICEF, *A child is a child – Protecting children on the move from violence, abuse and exploitation*, pp. 48 & 50. See further, Save the Children, UNHCR & UNICEF (2004), *Statement of Good Practice – 4th Revised Edition: Separated Children in Europe Programme*, pp.28-29;

³² UNHCR (2018), *Roundtable on Reception and Care Arrangement for Asylum-Seeking Children – Summary of discussions*, Bangkok, 10-11 October, pp.2 & 4.

³³ Treaty on the European Union ("TEU"), OJC 326/13, 26 October 2012, Article 3(3).

³⁴ Charter of Fundamental Rights of the European Union, OJC 326/02, 26 October 2012, ("EU Charter") Article 24

³⁵ EU Charter, Article 51(1).

³⁶ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, OJ L 031/18 ("Reception Conditions Directive"), Article 19(2); Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) ("Recast Reception Conditions Directive"), Article 24(2).

³⁷ Ibid.

³⁸ Council Directive 2004/83/EC of 29 April 2003 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304/12 ("Qualification Directive"), Article 30(3); and Directive

consideration in the implementation or application of the current secondary legislation.³⁹ However, the secondary legislation does not prohibit the detention of unaccompanied and separated children and, in some circumstances, expressly contemplates it.⁴⁰ In a return context, no express provision is made for family-based accommodation for unaccompanied and separated children, instead referring to accommodation in institutions.⁴¹

23. EU policy has referred to “appropriate accommodation” for unaccompanied and separated children⁴² but, in more recent times, has expressly referred to the option of foster care,⁴³ especially following discussion of it in the 10th European Forum on the Rights of the Child in 2016.⁴⁴ The Commission Communication on the Protection of Children in Migration (2017), and the Commission Staff Working Document accompanying the European Pillar of Social Rights, acknowledge the lack of specialised reception facilities for unaccompanied and separated children and identify foster care/family-based care as an accommodation option (and the challenges faced).⁴⁵
24. Following the 2013 Commission Recommendation on Investing in Children,⁴⁶ the 10 Principles of Integrated Child Protection systems (2015) attempted to bridge migration and non-migration contexts to take a child-rights approach, noting as one of its principles that “families are supported in the role as primary caregiver.”⁴⁷ Express support for integrated child protection systems was given in the Commission Communication on the Protection of Children in Migration in 2017.⁴⁸

2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) (“Recast Qualification Directive”), Article 31(3).

³⁹ Recast Reception Conditions Directive, Recital 9 and Article 23(1); Recast Qualification Directive, Recital 18 and Article 20(5); Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348/98 (“Return Directive”), Recital 22, Articles 5(a) and 10(1); Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (“Recast Procedures Directive”), Recital 33 and Article 25(6); Regulation (EU) No. 604 /2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (“Recast Dublin Regulation”), Recital 13 and Article 6(1).

⁴⁰ Recast Reception Conditions Directive, Article 11(3); see also Recast Dublin Regulation, Article 28(4), which provides that Reception Condition conditions and guarantees apply (including for unaccompanied and separated children) concerning detention; Return Directive, Article 17(1).

⁴¹ Return Directive, Article 17(4).

⁴² Communication from the Commission to the European Parliament and the Council, *Action Plan on Unaccompanied and separated Minors (2010-2014)* COM (2010)213 final, 6 May 2010, p.9.

⁴³ Communication from the Commission to the European Parliament and the Council, *The protection of children in migration*, COM(2017)211 final, 12 April 2017.

⁴⁴ European Commission (2016), 10th European Forum on the rights of the child, *The protection of children in migration 29 -30 November 2016 – Report*, pp.24, 38, 57-58, and 46 at note 23.

⁴⁵ Communication from the Commission to the European Parliament and the Council, *The protection of children in migration*, COM(2017)211 final, 12 April 2017, Pp. 8-9; Commission Staff Working Document, *Taking Stock of the 2013 Recommendation on “Investing in children: breaking the cycle of disadvantage”*, SWD(2017)258 final, 26 April 2017, pp. 8-9.

⁴⁶ Commission Recommendation of 20 February 2013 *Investing in children: breaking the cycle of disadvantage* (2013/112/EU) OJ L 59/5 which recommended to Member States to “[e]nhance family support and the quality of alternative care settings” (Recommendation 2.2) and “[e]nsure a focus on children who face an increased risk due to multiple disadvantage such as [...] some migrant or ethnic minority children, [...] children in alternative care” (Principle 1).

⁴⁷ European Commission (2015), *Ten Principles for Integrated Child Protection Systems* (presented at the 2015 European Forum on the Rights of the Child), Principle 4.

⁴⁸ Commission Communication on the Protection of Children in Migration (2017), op. cit., p.18.

25. The Committee on Civil Liberties, Justice and Home Affairs of the European Parliament called upon Member States to “provide unaccompanied and separated minors with adequate protection, irrespective of their status and under the same conditions as children who are nationals of the host country”.⁴⁹ The Committee indicated that:

“accommodation with host families in ‘living units’ and the sharing of accommodation with related or close minors should be encouraged when it is appropriate and accords with the minor’s wishes”.⁵⁰

26. The Council of the European Union has also acknowledged that the mainstreaming of the rights of the child “in all sectors and in all programming” should be further reinforced by the EU.⁵¹

2.3 Council of Europe

27. In the Council of Europe context, the standards and principles in relation to reception conditions for children have been exhaustively set out in the CDDH Analysis. Within the framework of the European Convention on Human Rights these mainly flow from Articles 3, 5(1)(f) and 8.

28. The European Court of Human Rights has noted the primacy of the status of the child. A child’s “extreme vulnerability” not only engages a State’s positive obligations under Article 3 of the Convention, but also takes precedence over considerations relating to the [child’s] status as an irregular migrant.⁵² The Court has specifically referred to placement with foster parents or in a specialised centre as being “more conducive to the higher interest of the child guaranteed by Article 3 of the Convention on the Rights of the Child” than detention in the context of the right to family life under Article 8.⁵³

29. Within the framework of the European Social Charter, the rights relating to reception conditions for children flow mainly from Articles 7, 11, 13, 17, 30, and 31. In its varied conclusions, the European Committee on Social Rights has, *inter alia*, highlighted that accommodating minors in overcrowded facilities and/or detention centres can result in serious and irreparable harm to the child’s life.⁵⁴ The Committee has noted that the European Social Charter thus engages States’ obligations to provide minors with access to adequate care and shelter, taking their specific needs and vulnerability into due consideration.⁵⁵

⁴⁹ European Parliament (2013), Committee on Civil Liberties, Justice and Home Affairs, *Report on the situation of unaccompanied and separated minors in the EU (2012/2263 (INI))*, Rapporteur: Nathalie Griesbeck, A7-0251/2013, 26 August, para 18.

⁵⁰ Ibid.

⁵¹ Council of the European Union, Council Conclusions on the Promotion and Protection of the Rights of the Child, 7775/17, 3 April 2017, para 9.

⁵² *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, No. 13178/03, 12 October 2006, para 55; *Muskhadzhiyeva and Others v Belgium*, No. 41442/07, 19 January 2010, paras 56-58; *Popov v France*, Nos. 39472/07 and 39474/07, 19 January 2012, para 91.

⁵³ *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, para 83.

⁵⁴ *International Commission of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v. Greece*, Complaint No. 173/2018, Decision on admissibility and on immediate measures, 23 May 2019, paras 14, 16.

⁵⁵ *European Committee for Home-Based Priority Action for the Child and the Family (EUROCEF) v. France*, Complaint No. 114/2015, 24 January 2018; *European Federation of National Organisations working with the Homeless (FEANTSA) v. the Netherlands*, Complaint No. 86/2012, 02 July 2014; *Defence for Children International (DCI) v. Belgium*, Complaint No. 69/2011, 23 October 2012; *Defence for Children International (DCI) v. the Netherlands*, Complaint No. 47/2008, 28 February 2010; *International Federation of Human Rights Leagues (FIDH) v. France*, Complaint No. 14/2003, 4 March 2005.

30. In terms of policy guidance, the Committee of Ministers of the Council of Europe have recommended that unaccompanied and separated children be placed in alternative and non-custodial care such as “residential homes or foster placements.”⁵⁶ The Committee of Ministers has also adopted Recommendations on the rights of children living in residential facilities⁵⁷ and on foster families.⁵⁸ However, the Recommendation on foster families presumes the unity of roles as guardian and foster parent, which may not reflect current State practice in respect of migrant and refugee children.⁵⁹
31. The Commissioner for Human Rights has strongly emphasized that unaccompanied and separated children should not be detained but receive care and be provided with “safe and suitable accommodation”.⁶⁰ Similarly, the Special Representative on Migration and Refugees has stated that “immigration detention is never in the best interests of the child”.⁶¹ He has further noted that providing children with access to child-friendly accommodation and care is of fundamental importance for children’s well-being by eliminating risks of, for example, sexual abuse, disappearances, and gender-based violence.⁶²
32. The Parliamentary Assembly has called for children to remain with their family and/or guardians “in non-custodial, community-based contexts while their immigration status is being resolved”.⁶³ Noting that unaccompanied and separated children should be dealt with as a matter of child protection rather than immigration control, the Parliamentary Assembly identified 15 common principles. These include that foster care should be preferably used in place of detention⁶⁴ and that unaccompanied and separated children should be able to benefit from comprehensive child welfare programmes on the same terms as nationals including placement in foster care or specialised residential care.⁶⁵ The 2017 Prague Conference Report noted that for “all children placed in alternative care, it is crucial to avoid institutionalised settings to the largest extent possible.”⁶⁶

3. Issues in the practical application of alternative family-based care

33. Notwithstanding the prevalence of Council of Europe, European Union and UN standards and guidelines on the use of alternative family-based accommodation for unaccompanied and separated children, its use in practice has been far from commonplace, at least in EU Member States, with most unaccompanied and

⁵⁶ Council of Europe, Committee of Ministers, *Recommendation Rec(2003)5 of the Committee of Ministers to Member States on Measures of Detention of Asylum Seekers*, 16 April 2003, para 23.

⁵⁷ Council of Europe, Committee of Ministers, *Recommendation (2005)5 of the Committee of Ministers to Member States on the Rights of Children Living in Residential Institutions*, 16 March 2005.

⁵⁸ Council of Europe, Committee of Ministers, *Recommendation No. R (87)6 of the Committee of Ministers on Foster Families*, 20 March 1987.

⁵⁹ On 20 November 1989, see <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

⁶⁰ Council of Europe, Commissioner for Human Rights, *Positions on the rights of minor migrants in an irregular situation*, CommDH/Position Paper (2010)6, p.4.

⁶¹ Committee of Ministers, *Thematic Report on migrant and refugee children Prepared by the Special Representative of the Secretary General on migration and refugees*, SG/Inf(2017)13, 10 March 2017.

⁶² Committee of Ministers, *Thematic Report on migrant and refugee children Prepared by the Special Representative of the Secretary General on migration and refugees*, SG/Inf(2017)13, 10 March 2017.

⁶³ Council of Europe, Parliamentary Assembly, Resolution 2020, *The alternatives to the detention of children*, 3 October 2014, para 9.7.

⁶⁴ Council of Europe, Parliamentary Assembly, Resolution 1810, *Unaccompanied and separated children in Europe: issues of arrival, stay and return*, para 5.9.

⁶⁵ *Ibid.*, para 5.13.

⁶⁶ Council of Europe (2017), *Immigration Detention of Children: Coming to a Close? Conference Report*, Prague, 25-26 September, p.35.

separated minors living in residential care.⁶⁷ The European Union Agency for Fundamental Rights (FRA) noted that foster care was only available in 12 EU Member States and was not available or extremely rare in 16 EU Member States.⁶⁸ In 2017, the European Commission noted “[w]hile the use of family-based care/foster care for unaccompanied and separated children has expanded in recent years and has proven successful and cost effective, it is still under-utilised”.⁶⁹

34. Synthesising some of the comparative research to date, several of the underlying challenges to the more widespread use of family-based accommodation have included:

- (a) **Insufficient places** for unaccompanied and separated children, including practical challenges to recruiting foster families;⁷⁰
- (b) **A lack of integration with child protection systems:**⁷¹ A disjunction between child protection systems and migration and asylum systems has been noted in research,⁷² and in some countries this has led to the care of unaccompanied and separated children being developed outside of the system that applies to national children. This has resulted in differences in treatment and standards applied.⁷³
- (c) **Lack of integration within child protection systems:** Even within child protection systems, responsibilities and budgets may be shared across multiple ministries and across national, regional and local laws and authorities – as well as being directed to specific groups of children. This can result in:
 - (i) variances in legislation⁷⁴ and policy⁷⁵ across a country;
 - (ii) coordination challenges (where a central authority nationally coordinates child protection and service providers);⁷⁶
 - (iii) the lack of express support for developing foster care;⁷⁷
 - (iv) difficulties in measuring cost effectiveness.⁷⁸

These variances may have an impact on the provision of alternative family-based care to unaccompanied and separated children.

⁶⁷ European Union Agency for Fundamental Rights (2017), Fundamental Rights Report 2017, Publications Office of the European Union, Luxembourg (“FRA Fundamental Rights Report (2017)”), p.184; De Ruijter de Wildt *et al.* (2015), *op. cit.*, p.127.

⁶⁸ *Ibid.*

⁶⁹ Communication from the Commission to the European Parliament and the Council, *The protection of children in migration*, COM(2017)211 final, 12 April 2017, p.8.

⁷⁰ De Ruijter de Wildt *et al.* (2015), *op. cit.*, p.127.

⁷¹ FRA Fundamental Rights Report (2017), *op. cit.*, p.183; De Ruijter de Wildt *et al.* (2015), *op. cit.*, p.128.

⁷² FRA Fundamental Rights Report (2017), *op. cit.*, p.184; De Ruijter de Wildt *et al.* (2015), *op. cit.*, p.127.

⁷³ FRA Fundamental Rights Report (2017), *op. cit.*, p.183; De Ruijter de Wildt *et al.* (2015), *op. cit.*, *supra*, p.128.

⁷⁴ European Union Agency for Fundamental Rights (2015), *Mapping child protection systems in the EU – National legislative framework*, February, <https://fra.europa.eu/en/publication/2015/mapping-child-protection-systems-eu/national-law>;

⁷⁵ European Union Agency for Fundamental Rights (2015), *Mapping child protection systems in the EU – National policy framework (action plan or strategy)*, February, <https://fra.europa.eu/en/publication/2015/mapping-child-protection-systems-eu/national-policy>

⁷⁶ European Union Agency for Fundamental Rights (2015), *Mapping child protection systems in the EU – Central authority with national coordinating role*, February, <https://fra.europa.eu/en/publication/2015/mapping-child-protection-systems-eu/national-coordination>

⁷⁷ De Ruijter de Wildt *et al.* (2015), *op. cit.*, pp.7 & 128; Note also the varying degrees of autonomy between national, regional and local levels identified in European Union Agency for Fundamental Rights (2015), *Mapping child protection systems in the EU – Decentralised child protection responsibilities*, February, <https://fra.europa.eu/en/publication/2015/mapping-child-protection-systems-eu/decentralisation>

⁷⁸ De Ruijter de Wildt *et al.* (2015), *op. cit.*, p. 128.

- (d) **The localisation of practices:** Good practices in relation to the placement of unaccompanied and separated children in foster care may remain only known in local spheres but which might be able to be successfully transposed both within a country and amongst other countries.⁷⁹
- (e) **The need for support and monitoring:** It is important for informal placements to be supported and monitored to reduce any risk to children.⁸⁰ Further, regional and project-based approaches, although positive, may not necessarily be integrated within the child protection system and may lack appropriate safeguards.⁸¹
- (f) **Consideration of the cultural needs of the child:** The cultural needs of the child form part of a best interest of the child consideration. Placing an unaccompanied and separated child with families of a different ethnicity may result in cultural differences, communication difficulties and result in an unsuccessful placement.⁸²
- (g) **Training and support to foster families:** Special support and training for foster families of the same or a different ethnicity to the child is needed to ensure the success of foster placements, especially in light of the child's cultural needs as well as any trauma and vulnerabilities that the child may be experiencing.⁸³

4. Reports and initiatives of other stakeholders

35. Reports on the use of family-based care for unaccompanied and separated children in Europe may be placed into four categories:

- (a) Mapping and comparative analyses;
- (b) Compilation of good practices;
- (c) Standard setting; and
- (d) Forthcoming reports.

36. Reports which have focussed on **mapping and comparative analyses** include:

- (a) CONNECT:⁸⁴ A mapping project on the reception, protection and integration policies for unaccompanied and separated children in Italy, the Netherlands, Sweden and the United Kingdom. The project included an exploration of the relationship between various actors and the development of specialised tools. Although not its central focus, the project did explore aspects of family-based care in the Member States selected, with detail about some of the policy choices and tools adopted.
- (b) Stichting Nidos, SALAR and CHTB⁸⁵ – a comprehensive overview of family-based reception for unaccompanied and separated children in EU Member States plus Switzerland and Norway. The report consisted of both country visits and desk research. In addition to a description of each State's system, the report identifies opportunities for development, challenges and recommendations. The report

⁷⁹ Ibid. See also the recommendation for transnational exchange in O'Donnell, R, & Hagan, M (2014), *CONNECT – Identification, reception and protection of unaccompanied and separated children: Project report*, http://www.connectproject.eu/PDF/CONNECT-Project_Report.pdf, p.95.

⁸⁰ De Ruijter de Wildt *et al.* (2015), *op. cit.*, p.7.

⁸¹ FRA Fundamental Rights Report (2017), *op. cit.*, p.185.

⁸² De Ruijter de Wildt *et al.* (2015), *op. cit.*, pp. 7-8.

⁸³ FRA Fundamental Rights Report (2017), *op. cit.*, p.185; De Ruijter de Wildt *et al.* (2015), *op. cit.*, p.8.

⁸⁴ O'Donnell, R, & Hagan, M (2014), *CONNECT – Identification, reception and protection of unaccompanied and separated children: Project report*, http://www.connectproject.eu/PDF/CONNECT-Project_Report.pdf

⁸⁵ De Ruijter de Wildt *et al.* (2015) *op. cit.*

identifies cross-cutting challenges to the further development of family-based care as well as highlighting some promising practices in individual States. It includes a brief review of scientific literature.

- (c) European Union Agency for Fundamental Rights:– A series of comparative mapping and analysis reports by the FRA over a number of years have emerged to give a more holistic understanding on the use and underlying challenges of family-based care in EU Member States through an examination of separated and unaccompanied and separated children,⁸⁶ guardianship provisions,⁸⁷ immigration detention of children,⁸⁸ foster systems,⁸⁹ child protection systems⁹⁰ as well as a continued and regular focus on unaccompanied and separated children and their reception in their monthly reports.⁹¹ The reports highlight the legal, policy and systemic challenges faced, particularly the inter-relationship between foster systems and national child protection systems in the context of unaccompanied and separated children.
- (d) ECRE: The No Longer Alone project⁹² resulted in comprehensive individual reports on the reception, integration and protection models and practices for unaccompanied and separated children in France, Hungary, the Netherlands, Scotland and Sweden. Each of the case studies included a policy and legislative analysis, identifying issues for improvement as well as the organisation and functioning of particular centres before making an assessment, SWOT analysis and recommendations.
- (e) European Migration Network (EMN): In 2010 EMN undertook a mapping on reception, return and integration arrangements of unaccompanied and separated minors across EU Member States.⁹³ Foster care is considered in some of the descriptions of Member State practices. “Best practices” were identified without an objective standard of what constitutes “best practice” other than noting examples “which can be considered as elements of measures taken in the “best interests of the child””.⁹⁴ Foster care for unaccompanied and separated children was included in the 2014 study on the use of detention and alternatives to detention.⁹⁵ EMN has also recently conducted mapping across the EU and Norway on approaches to

⁸⁶ European Union Agency for Fundamental Rights (2010), *Separated, asylum-seeking children in European Union Member States - Comparative report*, Publications Office of the European Union, Luxembourg.

⁸⁷ European Union Agency for Fundamental Rights (2018), *Guardianship systems for children deprived of parental care in the European Union – Summary*, Publications Office of the European Union, Luxembourg.

⁸⁸ European Union Agency for Fundamental Rights (2017), *European legal and policy framework on immigration detention of children*, Publications Office of the European Union, Luxembourg.

⁸⁹ FRA Fundamental Rights Report (2017), op. cit., pp.182-186.

⁹⁰ European Union Agency for Fundamental Rights (2015), *Mapping child protection systems in the EU*, February, <https://fra.europa.eu/en/publication/2015/mapping-child-protection-systems-eu>

⁹¹ See, for example, European Union Agency for Fundamental Rights (2016), *Key migration issues: one year on from initial reporting*, October, Publications Office of the European Union, Luxembourg, pp.4-8, see p.6 concerning reception conditions for unaccompanied and separated children; European Union Agency for Fundamental Rights (2018), *Migration to the EU: five persistent challenges*, February, Publications Office of the European Union, Luxembourg, pp.14-15; European Union Agency for Fundamental Rights (2018), *Periodic data collection on the migration situation in the EU – November Highlights*, November, pp.12-13.

⁹² European Council on Refugees and Exiles (2016), *No Longer Alone: Advancing Reception Standards for Unaccompanied and separated Children (NLA)*, <https://www.ecre.org/project/no-longer-alone/>

⁹³ European Migration Network (2010), *Policies on Reception, Return and Integration arrangements for, and numbers of, Unaccompanied and separated Minors – an EU comparative study* [Synthesis report], May, [http://emn.ie/files/p_20100716105712unaccompanied and separated%20minors%20synthesis%20report.pdf](http://emn.ie/files/p_20100716105712unaccompanied%20and%20separated%20minors%20synthesis%20report.pdf).

⁹⁴ Ibid., at p.142.

⁹⁵ European Migration Network (2014), *The use of detention and alternatives to detention in the context of immigration policies – Synthesis Report for the EMN Focussed Study 2014*, [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european migration network/reports/docs/emn-studies/emn_study_detention_alternatives_to_detention_synthesis_report_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/emn-studies/emn_study_detention_alternatives_to_detention_synthesis_report_en.pdf)

unaccompanied and separated minors following status determination which includes a consideration of foster care.⁹⁶

- (f) Odysseus Network: A mapping study of five EU Member States' alternatives to detention practices was published in 2015.⁹⁷ Alternative family-based care for unaccompanied and separated children was not explored, with the focus being on centres for unaccompanied and separated children.⁹⁸

37. Reports which have focussed on the **compilation of good practices** include:

- (a) Eurochild and SOS Children's Villages International:⁹⁹ A compilation of good practices on the provision of family and community-based care, particularly for unaccompanied and separated children. The compilation demonstrates how mainstream child protection services can be used effectively. It includes the use of foster care, community-based placement, and semi-independent living in 10 EU Member States plus Serbia.
- (b) PICUM: A brief report on promising policies and practices from governments in the protection of undocumented children.¹⁰⁰ The report focuses on promising measures that preclude the detention of children and families.

38. Reports which have focussed on **standard-setting or guidelines** (in addition to those identified at the international level in the legal and policy analysis section) include:

- (a) EASO: Operational standards and indicators have recently been published by EASO in the context of reception conditions for unaccompanied and separated children.¹⁰¹ However, notwithstanding the express reference to placement in foster families in EU asylum secondary legislation, the publication expressly excludes placement in foster families from its scope. Accordingly, the focus is on unaccompanied and separated children in reception and care facilities.¹⁰² Although "good practice" is identified, it is not on the basis of an objective standard through a formal evaluation and assessment but rather the presence of "higher existing standards within EU+ States".¹⁰³
- (b) ENGI: A report which identifies minimum standards, risk factors and recommendations in the context of guardianship for unaccompanied and separated children. It is based on contributions from practitioners in Belgium, Finland, Germany, Scotland, Sweden and the Netherlands.¹⁰⁴ It addresses eleven

⁹⁶ European Migration Network (2018), *Approaches to Unaccompanied and separated Minors Following Status Determination in the EU plus Norway*, July, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/00_eu_synthesis_report_unaccompanied_and_separated_minors_2017_en.pdf

⁹⁷ De Bruycker, P (ed.), Bloomfield, A, Tsourdi, E, Pétin, J (2015), *Alternatives to Immigration and Asylum Detention in the EU – Time for Implementation*, Odysseus Network, January, <https://odysseus-network.eu/wp-content/uploads/2015/02/FINAL-REPORT-Alternatives-to-detention-in-the-EU.pdf>

⁹⁸ Ibid., see p.101.

⁹⁹ D'Addato A, Giraldi M, Van Der Hoeven C and Fontal A (2017), *Let Children be Children: Lessons from the Field on the Protection and Integration of Refugee and Migrant Children in Europe*, Eurochild and SOS Children's Villages International, Brussels.

¹⁰⁰ Keith, L & Levoy, M (2015), *Protecting undocumented children: Promising policies and practices from governments*, Platform for International Cooperation on Undocumented Migrants (PICUM), Brussels.

¹⁰¹ European Asylum Support Office (2018), *EASO Guidance on reception conditions for unaccompanied and separated children: operational standards and indicators*, Publications Office of the European Union, Luxembourg.

¹⁰² Ibid., p.11.

¹⁰³ Ibid., p.15.

¹⁰⁴ Van Wijk, J, & Murk, J (2011), *Care for Unaccompanied and separated Minors – Minimum standards, risk factors and recommendations for practitioners*, ENGI – Guardianship in practice – Final report, European Network of Guardianship Institutions, Utrecht.

key themes, with placement in foster families considered in the section on housing.¹⁰⁵

- (c) **Quality4Children:** This report establishes quality standards for out-of-home childcare in Europe.¹⁰⁶ Consistent with the primacy of the status of the child, the standards make no distinction between national and unaccompanied and separated children. The standards are based on research from 32 countries (EU Member States plus Switzerland, Turkey, Norway and Iceland).
- (d) **International Detention Coalition:** The *Captured Childhood* report outlines a child sensitive assessment and placement model and identifies foster care as an alternative to detention, together with some examples of state practice.¹⁰⁷
- (e) **Global Protection Working Group:** A comprehensive report and enunciation of standards in relation to the protection of children in a humanitarian context (including refugee contexts).¹⁰⁸ Alternative care, including foster care, is expressly contemplated for unaccompanied and separated children.¹⁰⁹

39. **Forthcoming reports** from the European Union funded under the European Commission DG Justice and Consumers (amongst other key actions in the field of protection of children in migration following the Commission Communication of 12 April 2017)¹¹⁰ include:¹¹¹

- (a) **FORUM (FOR Unaccompanied and Separated Minors:** transfer of knowledge for professionals to increase foster care) - “to develop unaccompanied and separated minors foster care services in Europe” (including awareness raising to stakeholders, training and new knowledge to professionals).¹¹²
- (b) **SAFE (Supporting un-Accompanied children with Family-based care and Enhanced protection)** - “to build knowledge and capacity of professionals and foster carers, kinship and Dublin family caretakers to enhance family-based care to promote welfare and ensure protection of unaccompanied and separated children in the UK, Cyprus, Denmark and Greece.”¹¹³
- (c) **PROFUCE (Promoting Foster Care for Unaccompanied and separated Children in Europe)** - “To build social services’ capacity and awareness to promote a high quality system supporting foster families for unaccompanied and separated minors”.¹¹⁴
- (d) **FAB (Fostering Across Borders)** - “To improve and expand the quality of family-based care (FBC) for unaccompanied and separated migrant children (UMC) with dedicated foster carers (FC) trained and supported specifically in the issues and

¹⁰⁵ Ibid, p.22.

¹⁰⁶ Quality 4Children (2007), *Quality 4Children Standards for Out-of-Home Child Care in Europe*, Quality 4Children, Innsbruck.

¹⁰⁷ Corlett, D, with Mitchell, G, Van Hove, J, Bowring, L, Wright, K (2012), *Captured Childhood*, International Detention Coalition, Melbourne; see pp. 39 & 73.

¹⁰⁸ Child Protection Working Group (2012), *Minimum standards for child protection in humanitarian action*, Child Protection Working Group, p.14.

¹⁰⁹ Ibid., pp.120-126, 137.

¹¹⁰ European Commission (2018), *Key actions by the European Commission and EU agencies on the implementation of the Commission Communication of 12 April 2017 on the protection of children in migration*, 6 March, Brussels, http://ec.europa.eu/newsroom/just/document.cfm?doc_id=49908

¹¹¹ European Commission (2018), *Abstract of selected proposals*, Directorate-General Justice and Consumers, 8 January, Brussels, <https://ec.europa.eu/research/participants/portal/doc/call/rec/rec-rchi-prof-ag-2016/1800109-abstracts-awarded-rec-rchi-prof-ag-2016-en.pdf>

¹¹² Ibid., p.2.

¹¹³ Ibid., p.4.

¹¹⁴ Ibid., p.6.

challenges affecting UMC, so as to establish the highest standards of care and protection provided to them.”¹¹⁵

- (e) ALFACA II (Implementing sustainable Alternative Family Care for unaccompanied and separated Children) - “to improve reception and care for unaccompanied and separated children by structurally increasing the quality and quantity of family-based care (FBC) for them”.¹¹⁶

40. None of the projects above cover the entire geographic scope of the Council of Europe member States as they are predominantly European Union-focussed. The projects’ material scope also varies from the very specific (family-based care) to reception more broadly (including residential care).
41. Whilst the projects commonly identify relevant international and European standards, a number of the projects do not objectively identify what is considered “good practice” or “best practice” in relation to the placement of unaccompanied and separated children in family-based care.
42. Considering the challenges identified in the initiation and expansion of family-based care, the forthcoming EU-funded projects hold promise to address the issues of supporting foster parents, increasing the knowledge base and capacity building of stakeholders and professionals and increasing the quality and quantity of family-based care available.

IV. POTENTIAL CONTRIBUTION BY THE COUNCIL OF EUROPE

43. It seems clear that although long-promoted as desirable option for unaccompanied and separated children, there are policy and protection gaps that remain outstanding in the field of family-based care. There may be a need, for example, for legal and policy coherence between child protection and migration policy spheres, as well as for the dissemination and promotion of concrete examples and practical guidance. There may also be a need to highlight good practices beyond the local and regional levels to all Council of Europe member States. Work within the CDDH-MIG could represent a timely addition to other ongoing localised initiatives.
44. In light of the limited time-frame for the conclusion of the work by the CDDH-MIG – with two meetings foreseen in 2020 and further work beyond that uncertain – it is imperative to set a realistic aim for the type of product to be concluded by November 2020.
45. As already noted, the Council of Europe *Action Plan on Protecting Refugee and Migrant Children in Europe* calls for a draft Recommendation to the Committee of Ministers in the field of reception and accommodation. It has later been made clear, however, that the format, scope and specific focus of the product would be for the CDDH and CDDH-MIG to decide. At the present time, it does not seem advisable to produce a draft Recommendation on the topic as this would require a much longer time-frame and unequivocal support. Likewise, it seems evident that no new standards should be promulgated. Rather, existing legal standards, practical suggestions and/or examples could be clarified.

¹¹⁵ Ibid., p.8.

¹¹⁶ Ibid., p.14.

46. A short and user-friendly guide reflecting some central legal principles and practical suggestions might, therefore, be in order. Some carefully selected examples of implementation could be chosen as well to further illustrate how access to family-based care may be promoted. An example of themes that could potentially be addressed in such work is provided in document CDDH-MIG(2019)13. Such a brief, accessible and illustrative guide could be of added value in light of the extensive and comprehensive work in the field by other stakeholders.
47. The course of action to be taken remains, of course, for the CDDH-MIG to determine. Currently, the draft work-plan for 2020 (to be amended/confirmed at the upcoming 8th meeting of the CDDH-MIG, see CDDH-MIG(2019)11) assumes that a first draft of the product which the Group decides to pursue should be ready by the first meeting in 2020, preliminarily scheduled for 31 March – 2 April 2020. Written comments would be invited in advance of that meeting, with the intention to conclude a fully-fledged product at the Group's second meeting in 2020, preliminarily scheduled for mid-October 2020.